IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CELIA DIAMOND AND WILLIAM DIAMOND AND BRIDGET McGRAIL AND JOHN McGRAIL,

Appellants.

vs.

LAWRENCE F. CONNOLLY, ADMINISTRATOR OF THE ESTATE OF JOHN CORBETT, DECEASED, AND LAWRENCE F. CONNOLLY, INDIVIDUALLY, JOHN J. CONNOLLY AND JOHN E. McBURNEY,

Appellees.

Brief of Appellee, John E. McBurney

EZRA R. WHITLA, *counselor for Appellee.*

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STATEMENT OF THE CASE.

This is an action prosecuted by the appellants against the defendants, Lawrence F. Connolly and John F. Connolly, and an attempt to hold them under an implied trust claiming that they have received certain property upon the distribution of estate of John Corbett, deceased, which should have gone to the appellants. As to the appellees, the Connollys, it is strictly, purely and wholly an equitable action based

upon the theory of a trust relation and upon a claim by the appellants that because of fraud, practiced by said appellees, that the court of equity will prevent them from reaping the fruits of their alleged fraud by holding them as trustees for the real owners. As to the defendants, John E. McBurney, no allegations, whatever are made of any trust relationship, but as to him, the action is strictly legal, in an attempt to hold him under a written contract as bondsman for Lawrence F. Connolly while acting as administrator of the estate of John Corbett, deceased, he having no interest in the property whatever and not being in any manner connected with the parties and no allegation of any kind whatever being made against him except the single allegation that he was bondsman for the administrator.

To the bill of complaint as filed, the counsel for the appellee, John J. and Lawrence F. Connolly, filed a motion to dismiss.

A motion to dismiss was also filed by the appellee, John E. McBurney, and as the grounds of the motion are numerous and many of them, to-wit, par. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 25 and 26, of the motion of John E. McBurney, are the same as the same paragraphs of the motion filed by the other appellees, this brief will be presented upon the same grounds only where the right of defense of

John E. McBurney is different from that of the other appellees, leaving it for the counsel for the other appellees to cover the main questions of the case.

The main points made by the appellee John E. McBurney different from those of the other appellees are as follows:

I.

Misjoinder of cause of suit in the bill by bringing a legal action against J. E. McBurney, with a strictly equitable action against the other appellees. (Par. 2, motion of J. E. McBurney, page 49, transcript.)

II.

That no right accrues as against this defendant until an order has been made by the Probate Judge, and the administrator has failed to comply therewith.

(Par. 29, motion of J. E. McBurney, page 54.)

III.

That the bill of complaint shows that Lawrence F. Connolly has complied with all orders of the Probate Court having jurisdiction of the Corbett estate, and that by so doing, the closing of the estate and discharging the administrator relieved this defendant from all liability.

(Paragraph 27 and 30, motion of J. E. McBurney, page 54, 55, transcript.)

IV.

That there is no allegation of any fraud or any equitable action whatever against J. E. McBurney.

V.

That the only liability against J. E. McBurney is a legal action upon a written contract and that all action under said written contract is barred by the Statute limitations of the State of Idaho, particularly sections 4052 of the Code of Civil Procedure of the Revised Codes of State of Idaho, which is as follows, to-wit:

> "Section 4052 within five years; an action upon any contract, obligation, or liability, founded upon an instrument in writing."

VI.

That said action is also barred by the provisions of section 5627 of the Code of Civil procedure, of the Revised Code of the State of Idaho, which provides as follows, to-wit:

> "In the order or decree the court must name the persons and the proportions or part to which each shall be entitled, and such persons may demand, and sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of *heirs,* legatees or devisees, *subject only to be reversed, set aside, or modified on appeal."*

ARGUMENT AND AUTHORITIES.

Taking up the above matters in their reverse order, it is our contention that the statutes having explicitly provided in section 5627, before quoted, who can sue for and recover, and giving this right to the parties named in the decree, that this decree is conclusive and that when the administrator complies therewith, the bondsmen are released from all liability as the bondsmen are no guarantors of the correctness of the courts' decision, their obligation only being that the administrator will comply with such orders and account for the estate, and the administrator in this case having done so, and having turned over the property to those persons having a right to sue therefor, the liability of the bondsman thereupon ceased. If the parties who secure this property are not the rightful heirs and the court in some equitable proceeding afterwards should adjudge the holders of the property to be trustees, it would not change the decree nor create any liability under the bond. In this proceeding, no attempt is made to hold McBurney as a trustee but the only attempt is to hold him as a bondsman, and this cannot be done when the administrator has complied with the Probate Court's orders.

THE STATUTE OF LIMITATIONS.

The action against J. E. McBurney is wholly, absolutely and unquestionably legal in its nature. It is as to him, wholly an action upon a written contract, nothing more, nothing less, and upon his obligation under the written contract, the plaintiff's right against him must stand or fall. It is strictly legal in its nature, and being wholly a legal action, he has a right to have it tried in a court of competent jurisdiction and by a jury. As to it, the statute of limitations is a complete bar, and though limitation, in equitable suits are measured on the ground of laches, in legal actions it is an absolute bar, and according to the statutes of Idaho, section 4052, before quoted in full, the limitation on any action on any written contract is five years. The bill refers to the Idaho cases wherein this matter has been litigated and in the case of Connolly vs. Read, 22 Idaho 29, 128 Pac. 213, the opinion shows that on August 25, 1909, the final decree of distribution and settlement was entered. The statute of limitation as to all matters concerned in said estate as to the bondsman of the administrator, then commenced to run. This action was not filed until March 29, 1917, and at that time, the action was barred as to J. E. McBurney.

Again, before such an action can be maintained, there must be some order of some court directing the

administrator to pay the money or turn over the property, and a failure on his part so to do, before any liability attaches on the bond; 18 Cyc. 1261, 1280 subdivision B, 1284 subdivision 7:

> "By the weight of authority, there must be not only a final settlement, but also an order of the court directing the payment to be made, and a failure to comply therewith before an action on the bond can be brought by a distributee, a legatee, a person entitled to an allowance for support, or a creditor, for the non-payment of his claim."

18 Cyc. 1284 (Supra).

Loop vs. Northrup, et al, 13 N. Y. S. 144;

Nickols vs. Stanley, et al, 81 Pac. 117;

Scharman vs. Scoewl, et al, 56 N. Y. S. 498;

Metz vs. People, 40 N. W. 51;

Garvey vs. U. S. F. & G. Co., 79 N. Y. 337.

The United States Supreme Court in passing upon this question says:

> "There must be a decree ordering payment, and on which process to collect can issue against the principal;
>
> *Alexander vs. Bryan,* 110 U. S. 414.

EQUITABLE SUITS AND ACTIONS AT LAW SEPARATE IN FEDERAL COURT.

In this proceeding it is our contention that the attempt to commingle in the equitable action against the appellees, the Connollys, a purely and legal action

against the appellee, John E. McBurney, is without any precedent. It is a fundamental principle of the Federal Equitable jurisdiction that equity and law are separate and distinct.

> "Yet although a great number of the states of the American Union, and even England itself has fused together the two systems, in the courts of the United States, while the same judges have jurisdiction in each, the common law and equity are still as distinct as they were in the time of Coke and Bacon."
>
> Foster's Federal Practice, 2nd. Ed. par. 4.
>
> "The distinction between law and equity in the Federal Courts is made in the constitution itself, and naturally the jurisdiction in equity which the framers of the Constitution had in mind was that jurisdiction as it prevailed at the time when the constitution was adopted."
>
> "Hughes Federal Procedure, page 378."
>
> "So marked is the distinction between the jurisdiction of the Courts of the United States in equity, and at law, with respect to procedure, that blending together in one suit in a Federal Court of essentially legal, and equitable remedies cannot be authorized or justified by any state statute or practice on the subject, (citing cases). An allowance of such blending would result in a confusion of procedure not contemplated in the Federal Constitution, or judiciary act, and would be calculated to embarrass the administration of justice."
>
> *Jones vs. Mutual Fidelity Co.,* 123 Fed. 506, page 518

The United States Supreme Court has also passed directly upon this question, stated as follows:

> "The Federal Court has no jurisdiction of a suit in Equity in which a claim only cognizable at law is united with a claim for equitable relief."
>
> *Scott vs. Neely,* 140 U. S. 358.

These rules are applicable with their full force and effect for here the complainants are attempting to commingle with the purely equitable suit brought against the appellees, Connollys, a purely legal action against the appellee, McBurney, when the appellee, McBurney, is not in any manner interested in the equitable action against the Connollys.

In this case, there is no attempt being made to set aside, modify, or vacate the decree of the Probate court. The pleadings do not establish a case attempting to hold Lawrence Connolly as administrator. The brief states specifically that they are attempting to hold both Lawrence Connolly, and John J. Connolly as trustees. (Page 61 appellants brief and closing par. page 74.) Under the claim now made by the appellant, it would make no difference whether Lawrence Connolly had been administrator or not, if he had made the misrepresentation claimed of, and secured the property wrongfully, he could have been held as trustee for the true heirs under appellant's contention, and the fact that he was at one time administrator would neither increase or diminish the legal obligation.

> "Where an undertaking was filed in the suit to release the property from the lien, the complainant may take a personal decree only against the defendant, and may bring an action at law against the sureties of the undertaking."
>
> *Phillips vs. Gilbert,* 101 U. S. 514.

As to the other points in the case we respectfully submit to this Honorable Court the opinion by the learned District Judge, appearing page 57-73 of the Transcript. The opinion so thoroughly covers the law applicable to the other points that writing a brief would be useless and an encumbrance to the court.

In submitting the case to the court we respectfully submit that in addition to the authorities cited, and the ground laid down by the learned District Judge in sustaining the motions to dismiss the bill that—as to the defendant, J. E. McBurney—there was:

1st. A misjoinder of parties by commingling a suit in equity against the appellees, the Connollys, with a legal action against the appellee, McBurney.

2nd. That no legal right of action would accrue as against the appellee, McBurney, until the administrator had failed to comply with some order of the court.

3rd. That Lawrence F. Connolly, as administrator, having complied with all orders of the probate court having jurisdiction of the Corbett estate,

and his acts having been approved and he having been discharged as administrator, that no action lies against his bondsman until the probate court's decision is vacated, annulled or set aside.

4th. That the action against J. E. McBurney, being a legal action and upon a written contract, is completely barred by the statute of limitations of the State of Idaho which limits the commencement of any action upon a written contract of action, founded upon an instrument in writing of five years.

We therefore pray an affirmative of the order and judgment complained of dismissing the action.

Respectfully submitted,

EZRA R. WHITLA,

Solicitor for Appellee, J. E. McBurney.